SUPREME COURT, U.S.
AUG 3 1966
JOHN F. DAVIS, CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 274

JOSEPH I. MOREALI, *Petitioner,*

vs.

WORKMEN'S COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA, LOWELL FOODS, INC. and STATE COMPENSATION INSURANCE FUND, *Respondents.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, Workmen's Compensation Appeals Board of the State of California (formerly Industrial Accident Commission), respectfully submits its brief in opposition to the petition for a writ of certiorari filed by petitioner Joseph I. Moreali.

OPINIONS BELOW

On December 5, 1967, respondent Appeals Board issued its Order Denying Reconsideration (petition, pp. 13-15) of its referee's Supplemental Findings and Orders dated October 16, 1967 (petition pp. 15-17) thereby affirming the determination that petitioner had not shown good cause to reopen the Board's 1963 decisions in the matter.

The 1963 Findings and Award (Exhibit I attached hereto) and the 1963 Opinion and Order Denying Reconsideration and the referee's Report and Recommendation on Petition for Reconsideration (Exhibit II attached hereto) had in effect determined that surgery to the congenital bunion on petitioner's left foot, any temporary disability beyond the 7-day waiting period and any further medical treatment was not due to petitioner's stubbing his toe at work on June 16, 1962 and had denied benefits therefor.

A petition for writ of review of these 1963 decisions was denied by the Court of Appeal, First Appellate District, State of California, without opinion, on September 6, 1963, and a petition for hearing in the Supreme Court of California was denied without opinion on October 1, 1963.

From the Board's 1967 decision petitioner filed a timely petition for writ of review in the Court of Appeal, First Appellate District, State of California, which was denied without opinion on April 10, 1968. Petitioner next filed a petition for hearing in the Supreme Court of the State of California, which was denied without opinion on May 9, 1968.

JURISDICTION

The jurisdiction of this Court is invoked under 28 *United States Code,* Section 1257(3).

Petitioner asserts that he "and 7,000,000 other California workers (and their 8,000,000 dependents) who may sustain *hidden* injuries" have been deprived of the equal protection of the law and the due process of law guaranteed them by the *United States Constitution,* Amendment XIV, Section 1, because the respondent Appeals Board reached its decision herein in reliance upon the opinion of an orthopedic surgeon and because the Board allegedly applied a different rule of law from that governing cases involving "their brothers in the same class or group who sustain injuries *visible* to the naked eye or x-ray film . . ." (petition, p. 20; emphasis added).

Respondent Board submits that the Court of Appeal and the Supreme Court of the State of California correctly applied controlling California statutes and case law which, in turn, are not in conflict with the Constitution, the laws of the United States or decisions of this Court. It is submitted that petitioner has not shown any federal question to exist and that the case does not, in fact, present any federal question. It is further submitted that the petition for writ of certiorari should be summarily denied under *United States Supreme Court Rule No. 23, subdivision 4,* because it fails to

> ". . . present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration. . . ."

THE QUESTIONS PRESENTED

1. Should the petition for writ of certiorari be denied under *United States Supreme Court Rule No. 23, subdivision 4?*

2. Did respondent Appeals Board, in refusing to reopen its 1963 decision in this matter, deny petitioner due process of law and equal protection of law as guaranteed him by the *United States Constitution,* Amendment XIV, Section 1?

STATUTES INVOLVED

California Labor Code provides, in pertinent part, as follows:

> *Section 4600.* "Medical, surgical, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, . . . which is reasonably required to cure or relieve *from the effects of the injury* shall be provided by the employer. In the case of his neglect or refusal seasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment. . . ." (Emphasis added.)
>
> *Section 4650.* "If an injury *causes temporary disability,* a disability payment shall be made for one week in advance as wages on the eighth day after the injured employee leaves work as a result of the injury; provided, that in case the injury causes disability of more than 49 days or necessitates hospitalization the disability payment shall be made from the first day the injured em-

ployee leaves work or is hospitalized as a result of the injury. . . ." (Emphasis added.)

Section 5803. "The appeals board has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of this division. At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any such order, decision, or award, *good cause appearing therefor.* . . ." (Emphasis added.)

Section 5804. "No award of compensation shall be rescinded, altered, or amended after five years from the date of the injury except upon a petition by a party in interest filed within such five years . . . ."

STATEMENT OF THE EVIDENCE

The petition contains little in the way of a statement of the facts in this case and much that is not evidence. Moreover, the petition sets forth on page 18 under the heading "THE 'DECISION' ITSELF —SO FAR DEEMED SACROSANCT AS COMING FROM GOD HIMSELF" a jumble of out-of-context statements from Dr. J. B. Josephson, upon whose opinion the Board relied, juxtaposed in such a manner as to disparage the doctor's competence and candor.*

*As a matter of record the first, third and fourth paragraphs on page 18 are from reports and testimony given before the 1963 Board decision and therefore not, strictly speaking, part of the case before this Honorable Court today. The second paragraph is a statement made under oath on September 6, 1967, which was followed however by testimony of a completely different purport. The

Because of the scanty and jumbled statement of the facts in the case set forth in the petition and because of the almost scurrilous nature of the accusations made by petitioner against Dr. Josephson and respondent Board, it becomes incumbent upon the Board to set forth in intelligible fashion the essential facts for consideration by this Honorable Court.

The 1963 proceedings

Joseph I. Moreali was born December 1, 1923, with bilateral metatarsus adductus, a condition afflicting about 5% of the population, in which the large toe turns toward the center line of the body very much like the thumb on one's hand. As individuals with this condition grow and wear shoes, the forcing of the great toe into a position parallel with the other toes develops what is known as a hallux valgus, from which develops a bony exostosis, known to laymen as a bunion. On July 21, 1947, long before the inci-

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complete colloquy between counsel for petitioner and Dr. Josephson was as follows:

"A. We have to call those educated guesses because it took me many years——

Q. You were guessing?

Mr. Supan: I object to the question. It has been asked and answered.

The Witness: It is not guessing.

Mr. Johnson: Q. You say it is an educated guess, but it is not a guess?

A. No, it is not a guess; it is an opinion.

Q. Is there any difference between a guess and an opinion?

A. There certainly is. One of them depends upon the law of chance, and the other depends upon a great process of reasoning.

Q. And assuming God features in you of omnipotence, you said you had to bring in the omnipotence?

Mr. Supan: I object. He is harassing the witness.

Referee: Sustained." (R.T., September 6, 1967, p. 50, lines 2-19.)

dent which gave rise to this case, Mr. Moreali sustained an industrial injury to his right foot which necessitated surgery on that foot. This surgery was performed by Dr. J. B. Josephson and Dr. Nels W. Ahnlund, one of his office associates, both of them orthopedic surgeons. At the same time the doctors repaired the bunion on Mr. Moreali's left foot.

On June 16, 1962 while employed as a butcher for Lowell Foods, Inc., Mr. Moreali stubbed and bruised his left foot. He was not disabled for longer than seven days immediately following this incident. However, due to pain, he consulted his family physician, Dr. Albert V. Giampaoli, who had x-rays taken on June 30, 1962 and who referred him again to Dr. Josephson. On July 31, 1962, Dr. Josephson operated on the left foot, having first advised Mr. Moreali that while he was recovering from the effects of the injury of June 16, 1962, the trouble that he was having and would continue to have with his left foot was a natural result of the congenital condition for which surgery had been previously performed. The surgery was therefore done on a non-industrial basis. Nevertheless, on September 11, 1962, Mr. Moreali filed an application for workmen's compensation benefits claiming reimbursement for this self-procured surgery and for temporary disability indemnity from and after July 22, 1962. After hearings in which Dr. Josephson's reports were presented and he testified at length, the referee issued Findings and Award on March 29, 1963, denying Mr. Moreali's claim on the ground that it arose out of the preexisting progres-

sive congenital condition which was neither accelerated, exacerbated nor "lighted up" by the industrial injury. A petition for writ of review was denied by the Court of Appeal of the State of California and a petition for hearing was denied by the Supreme Court of California.

The 1967 proceedings

On June 15, 1967, the last day before the Appeals Board's jurisdiction would expire, Mr. Moreali filed a petition to reopen the 1963 award. He gave, as the required "good cause" for reopening, the fact that in *September 1963* he had discovered new evidence consisting of 1959 x-rays of his left foot which, being identical with the June 30, 1962 x-rays, would show conclusively that there had been no progressive deterioration of the condition of his foot and would therefore refute totally Dr. Josephson's opinion on which the Board chiefly relied in its 1963 decision.

A hearing was held on September 6, 1967. The 1959 x-rays were offered into evidence along with a roentgenological reading to the effect that they showed a similar angular alignment between the toes to that shown by the 1962 x-rays. Dr. Josephson testified at length. Mr. Moreali urged, mainly through the assertions of his counsel during the cross-examination of Dr. Josephson, that the 1959 x-rays really showed that the preexisting congenital condition was nondisabling prior to being "lighted up" by the 1962 industrial injury. No expert medical evidence was of-

fered by Mr. Moreali to support this view. When questioned about the x-rays Dr. Josephson said that since they were "static" they did not show dynamic changes taking place in Mr. Moreali's foot, that is, the pulling of the big toe under the other toes which necessitated the surgery, all of which had been discussed with Mr. Moreali before the surgery was performed. Dr. Josephson also testified that the 1959 x-rays did not at all change his evaluation of his findings at surgery, which confirmed his previous diagnosis, that the condition for which surgery was being performed was the congenital one and had nothing whatsoever to do with the slight bruise which occurred on June 16, 1962. Dr. Josephson further testified that he was aware of the rule of law in California that an injury which "lights up" a quiescent preexisting condition is considered responsible for the "lighting up" but that at the time he saw Mr. Moreali, about a month after his 1962 injury, he was recovering from the effects of the injury and what required surgery was simply the original condition. He further stated that a series of operations are frequently required for this kind of a condition because one operation will not correct it completely.

At the 1967 hearing, as at the hearing in 1962, Mr. Moreali testified that he had had no difficulty whatsoever with his left foot from a few months after the 1949 surgery until the 1962 injury. However, as Dr. Josephson pointed out, this statement was refuted by the very 1959 x-rays on which the petitioner was relying to reopen his case. Mr. Moreali's testi-

mony was further refuted by hospital records which were introduced *on his behalf* containing a history given by him to a Dr. George Waters on November 14, 1963, in which after mentioning the 1949 surgery Dr. Waters remarked, "He [Moreali] had some persistent difficulty with the left great toe thereafter." (To this contradiction in petitioner's own evidence the petition before this Honorable Court makes no reference whatsoever.)

The referee found in his Supplemental Findings and Orders dated October 16, 1967, (petition, pp. 15-17) that good cause to reopen was not shown, and denied the petition. Mr. Moreali's petition for reconsideration was denied by the Appeals Board, which adopted and incorporated the reasons of the referee contained in his Report and Recommendation on Petition for Reconsideration (petition, pp. 13-15) namely:

> ". . . The so-called new evidence (4 years in applicant's possession before he filed his petition to reopen, incidentally,) was not sufficient to change either the doctor's opinion nor necessarily, the Referee's."

Petitioner's attempts to secure review of this decision by the highest courts of California were unavailing.

ARGUMENT AND AUTHORITIES

I

FOR FAILURE TO COMPLY WITH THE UNITED STATES SUPREME COURT RULES, THE PETITION SHOULD BE SUMMARILY DENIED.

Supreme Court Rule No. 23, subdivision 4 (28 U.S.C.A.) provides:

> "The failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

Not only are the facts not presented accurately or with clarity or brevity, but the facts at issue and the questions to be decided in the 1963 part of the case and the 1967 part of the case are so inextricably commingled in the petition that it is impossible to determine which facts relate to the earlier case not now before this Honorable Court and which facts relate to the case which is presently before it. Petitioner is apparently under the impression that on his petition to reopen he is entitled to retry all the issues which have long since become final and his confusion in this regard is reflected in his petition itself. The inaccuracies in the petition are best exemplified by the misrepresentation of Dr. Josephson's opinions footnoted supra at pages 5-6.

It is respectfully submitted that for failure to comply with the stated rule, the petition should be summarily denied.

II

RESPONDENT BOARD SUBMITS THAT THERE HAS BEEN NO VIOLATION OF THE CONSTITUTIONAL REQUIREMENTS OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW IN THIS CASE.

As shown by the statement of facts, petitioner was given numerous hearings and was permitted a full and complete opportunity to present his evidence. Both procedurally and substantively, petitioner was accorded due process of law.

Controlling California statutes and case law were applied to this case and are applied uniformly to all cases of injury—"hidden" or otherwise. Accordingly, petitioner was not deprived of equal protection of the law.

The finding of the Board that petitioner had not shown good cause to reopen the 1963 decision was made after due consideration of all the evidence and was based upon substantial and uncontradicted medical opinion concerning causation, not upon "guesses". Furthermore, the decision was based upon the important premise that petitioner had failed to introduce any evidence from which the Board would have been justified in reopening its old decision. Thus there would appear to be no federal question presented by this case.

Petitioner has, however, made sweeping accusations against the courts in California charging that the men "in black robes" have surrendered decision-making to the men "in white robes" (p. 25), the "partisan, fee-hungry doctor . . . of deliberate perjury

and fraud" (p. 27). Petitioner claims that the rule of *Tanenbaum v. Ind. Acc. Com.* (1935), 4 Cal. 2d 611, has been abrogated in this decision in a way which constitutes a deprivation of petitioner's constitutional rights. Petitioner also makes reference to certain decisions and cases in which his own counsel participated and claims that they support his position.

Because of the confusion created by the petitioner's presentation of the case your respondent Board feels the petition requires answering even though the issues involved are more strictly for consideration by the state courts than by this Honorable Court.

A. The Rule in Tanenbaum v. Ind. Acc. Com. Has Not Been Misapplied in This Case.

In the *Tanenbaum* case the Supreme Court of California approved apportionment of a woman employee's permanent disability to her shoulder between the industrial injury and the "normal progress of the preexisting arthritis" which, prior to her accident, had been dormant. The court affirmed the then Industrial Accident Commission's apportionment which, in turn, was based upon medical opinions adduced before it.

The rule, reiterated by the court in *Tanenbaum* that "the employer takes the employee subject to his condition when he enters the employment", was held not to militate against the apportionment made in the case. The court distinguished between injury which in a person of a stronger constitution would

cause no disability but which is nevertheless compensable and a disability which to the extent that it is due to the normal progress of a preexisting condition is not compensable. It will be noted that in *Tanenbaum,* as here, the applicant testified that prior to injury she was not disabled or troubled by arthritis and, as here, the injury was one which might be called a "hidden" one. Also, as here, the opinions of the doctors prevailed over the claim of the applicant herself that she had no preexisting condition to which her disability could be attributed. Both procedurally and substantively the decision of the California Supreme Court in *Tanenbaum v. Ind. Acc. Com.,* still the law in California, is very strong support for the Board's decision in this case. We are now, of course, referring to the Board's original, that is to say, the 1963 decision. The *Tanenbaum* case has no relationship at all to the decision arrived at by the court in 1967, the one which is really the subject matter of this proceeding.

B. Petitioner Has Not Shown "Good Cause" to Reopen Under Labor Code Sections 5803 and 5804.

The 1967 case arose out of the petition to reopen filed the day before the end of the Board's 5-year jurisdiction within which it has the right to alter or amend its decision, "good cause appearing therefor". Of these qualifying words the Supreme Court of California has had this to say:

> "It is self-evident, we think, that if the words, 'good cause appearing' are to have any place or purpose in said statutory provision, the power of

> the commission to change its former orders or awards may not be predicated upon a mere change of opinion by the commission as to the correctness of its original decision, but there must exist some good ground, not within the knowledge of the commission at the time of making the former award or orders, which renders said original award or orders inequitable. In the absence of any such circumstance justifying a reexamination of the controversy, the commission is powerless to act, and the former award or orders are final and invulnerable." *(Merritt-Chapman & Scott Corp. v. Ind. Acc. Com.* (1936), 6 Cal. 2d 314, 316-317.)

The Supreme Court in the *Merritt-Chapman* case went on to say that the power to reopen " 'invoked on the ground of newly discovered evidence, should be exercised with great caution and when fraud, inadvertence, mistake or excusable neglect are clearly shown. Otherwise the process of introducing evidence before the commission would be interminable and the commission might be held to abuse its discretion in the exercise of its power under section 20 (d) [predecessor to Labor Code Sections 5803 and 5804].' " (Ibid, p. 318.)

At the time of its 1963 decision in this case the Board had before it detailed medical history on the applicant including a report from the Dr. Giampaoli who ordered the controversial 1959 x-rays. Petitioner herein never attempted to show any reason why those 1959 x-rays were not discovered long before the time of filing the petition to reopen in 1967 and specifically why they were not filed along with the report from

Dr. Giampaoli in 1962. Even assuming that there was excusable neglect, mistake, or inadvertence in their not having been produced earlier, petitioner did not produce any medical opinion from which the Board would have been justified in concluding that the x-rays were of sufficient probative value that justice and equity required upsetting its previous decision holding that the 1962 surgery to the applicant's left foot was due to the progressive nature of his congenital condition and not to the already healing bruise to his toe incurred at work.

Dr. Josephson explained in great detail when on the stand in 1967 why the 1959 x-rays were not sufficient to change his original opinion that the surgery was not industrially related. The hospital records containing petitioner's interim history supported Dr. Josephson's opinion that the left foot was deteriorating prior to and irrespective of the 1962 injury.

Petitioner's 1967 "new evidence" was not only insufficient to constitute good cause for altering the Board's 1963 decision; its total effect was to substantiate the propriety and justice of that decision.

C. Where the Determination of Whether a Particular Disability or Medical Treatment Is Required Because of an Industrial or a Non-industrial Condition Involves a Medical Evaluation of Causation of the Condition, It Is Proper, Indeed It Is Necessary, That the Board Rely, in Making Its Decision, on Proper Medical Opinion.

The California courts have said:

> "'It is only when there is a direct causal connection between the exertion of the employment and the injury that an award of compensation

> can be made. *The substantial question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.* In the former case, no award can be made; in the latter, it ought to be made.'" *(Beveridge v. Ind. Acc. Com.* (1959), 175 Cal. App. 2d 592, 598; emphasis the Court's.)

The courts have also stated concerning the issue of industrial causation:

> "That issue may run a gamut from the blatantly obvious to the scientifically obscure. If a painter falls to the ground as the result of a scaffold collapse, breaking his leg, common sense dispenses with medical evidence of causation. Other sources of disability are less available to lay discernment. . . . a fatal heart attack, . . . impairment of vision by arc welding flashes . . . the connection between an industrial leg trauma and varicose ulcers . . .
>
> "Examples might be multiplied. They condense into the general proposition that the medical cause of an ailment is usually a scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters." *(Peter Kiewit Sons v. Ind. Acc. Com.* (1965), 234 Cal. App. 2d 831, 839.)

Both Board decisions here required expert medical opinion: the decision in 1963 on the issue of whether petitioner's 1962 injury or the normal progress of his congenital condition necessitated the self-procured surgery and the temporary disability; and the decision in 1967 on the issue of whether findings in the

1959 x-rays were sufficient to alter the decision on causation arrived at in 1963.

In the 1963 phase of this case at least, petitioner had some medical opinion, though of doubtful value, in support of his position. But that phase of the case is not before this Court now.

In the 1967 phase of the case petitioner had *no* medical opinion in support of his position; his case rested on no more than his counsel's contentions and slurs upon the operating surgeon. The Board would not have been justified in finding in his favor and was thoroughly justified in finding against him.

D. The Cases Cited by Petitioner in Which His Counsel Has Participated Are Not Authorities for Granting a Writ of Certiorari in This Case.

Petitioner refers to the case of *Mannina v. Ind. Acc. Com.* (1959), 24 Cal. Comp. Cases 148 (petition for writ of certiorari denied by the U.S. Supreme Court in October 1959). In that case counsel for petitioner made many of the same arguments that he makes here, claiming that his client was suffering from a "hidden" injury and that his client was denied due process of law and equal protection of the law because the same rule did not apply to his client as applied to workmen with "visible" injuries. This Honorable Court refused to hear the matter.

Evans v. Ind. Acc. Com. (1945), 71 Cal. App. 2d 244, merely held that where the medical opinions were divided in a dermatitis case as to its industrial causation, depending upon whether the man's entire body

was covered with the dermatitis or whether only the parts that were exposed to the offending material to which he was subjected at work were affected, it was error on the part of the then Commission to exclude lay evidence to the effect that dermatitis was only on the exposed portions of the body and remanded the matter to the Commission for further hearing to permit the introduction of the evidence in question.

In *Cadotte v. Ind. Acc. Com.*. (1948), 86 Cal. App. 2d 754, petitioner's counsel was making very much the same kind of argument that he is making in this case, juxtaposing the testimony of an injured worker against that of the medical witnesses and contending that the then Commission must accept the injured worker's testimony over and above that of the doctors'. The court in that case stated (page 758):

> "We cannot say as a matter of law that the commission must accept the testimony of petitioner as to pain and disability as against that of a medical man, or vice versa. The testimony of each must be considered by the commission and the conflict must be resolved by it. When that is done, this court may not interfere."

The case is obviously not authority for the position that petitioner is taking in this instance.

In the case of *Collins v. W.C.A.B.*, 31 Cal. Comp. Cases 297, the Court of Appeal, First Appellate District, State of California, denied a petition for writ of review on September 26, 1966, and a petition for hearing was denied by the Supreme Court of California on October 27, 1966. In that case, as in this

case, counsel for petitioner contended that the testimony of the applicant and that of the chiropractor who treated her should have been accepted by the Board, which instead relied on the opinion of 8 doctors. These opinions were variously described as "bags of wind, mere guesses and bunk" (p. 299). The question there was the amount of petitioner's permanent disability but the issue as claimed by her counsel was the same as here and the result was certainly not authority for the position that petitioner is taking in the instant case.

III

PETITIONER'S ADDITIONAL CHARGES FIND NO SUPPORT IN THE RECORD.

Petitioner's charges that the doctor was acting omnisciently and that the Board was rubber-stamping his decision and that the courts of California did likewise is without support in the record; the record on the other hand is replete with patient and thorough consideration of all the unsupported charges that petitioner has been making in this matter for the last five years. It is quite apparent that the basic position taken by petitioner in this case is that if a decision is rendered against him, it must be because the law is being misapplied, facts are misunderstood, and a general conspiracy exists between doctors, Board and courts. He cites no authority in California or otherwise to support his position.

CONCLUSION

Respondent Board submits that there has been no violation of the constitutional requirement of due process or equal protection of the laws. Petitioner was given every opportunity to present evidence which might have convinced the Board that its 1963 decision against him should be reopened. He failed to produce that evidence and the logical finding of fact, that good cause to reopen had not been shown, followed. The California appellate courts did not disturb this finding as it was based on substantial evidence.

Respondent Board submits that for the reasons set out above the petition for writ of certiorari should be denied.

Dated, San Francisco, California,
July 31, 1968.

Respectfully submitted,
EVERETT A. CORTEN,
Attorney for Respondent Workmen's Compensation Appeals Board of the State of California.

SELMA MIKELS,
Of Counsel.

(Exhibits Follow)